Supreme Court, U.S.
FILED

09-660 SEP 09 2009

OFFICE OF THE CLERK
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Case No.:

IN THE SUPREME COURT OF THE UNITED STATES

JAYRAJ NAIR
Petitioner,

vs.

THE SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF PLACER,

Respondent,

BINDU NAIR
Real Party in Interest.

On Petition for a Writ of Certiorari to the Supreme Court of California

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Was Petitioner deprived of his due process rights of an opportunity to be heard when a restraining order was issued against him based upon hearsay testimony and in which one of the protected persons was precluded from testifying at the trial?

Was Petitioner deprived of his constitutional rights to raise his children when they were removed from his custody without satisfying due process rights?

PARTIES TO THE PROCEEDING

The writ petition was taken from a family-law action in which Petitioner is Jayraj Nair and Respondent is his ex-wife, Bindu Nair. In the writ proceeding the respondent was Placer County Superior Court and the real party in interest was Bindu Nair.

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I. CITATIONS OF UNDERLYING OPINIONS

The underlying opinion from which the instant petition for writ of certiorari is being taken is Nair v. Superior Court of Placer County, California Supreme Court case no. S173589. (App A-1.) It is unreported.

The case underlying that case is Nair v. Superior Court of Placer County, California Appellate Court, Third District Court of Appeal, case no. C061761. (App A-2.) It is unreported.

The case underlying that case is Nair v. Superior Court of Placer County, Placer County Superior Court case no. SDR-26925. (App A-3-A-21.) It is unreported.

II. BASIS FOR JURISDICTION

This petition seeks review of the denial of Petitioner's writ petition to the California Supreme

Court, a copy of which is attached hereto. The order sought to be reviewed was entered on July 8, 2009.

This Court has jurisdiction to review the California Supreme Court decision denying petitioner's petition for review because the issue on review was a federal constitutional issue regarding due process rights. 28 U.S.C. §1257(a).

III. CONSTITUTIONAL PROVISIONS AT ISSUE

The United States Constitution provides, in relevant part, as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law" U.S. Const., 14th Am., sec. 1. It further provides that no person shall "be deprived of life,

liberty, or property, without due process of law . . . ." U.S. Const., 5th Am.

IV. STATEMENT OF FACTS AND CASE

Petitioner is Father, Jayraj Nair ("Jayraj"); real party in interest is Mother, Bindu Nair ("Bindu"); their children are Suraj and Sujay Nair. Jayraj and Bindu are dissolving their marriage.

On February 4 through February 8, 2008, trial was held in Placer County Superior Court on issues including custody and visitation. (Exh 1 at p. 1.)[1] On April 2, 2008, the parties were served with a March 27, 2008 tentative statement of decision, titled Ruling After Custody Trial. (Exh 1.) In that tentative statement of decision, the court ordered Suraj (the older child) to attend

[1] / Citations are to the Exhibits filed in the Third District Court of Appeal as part of Petitioner's writ petition.

counseling sessions, as "the first step" toward reunifying him with Mother. (Exh 1 at p. 3.) The court found it in the best interests of both children for the parties to share physical custody of the children. (Exh 1 at p. 5.) The court set up a two-tiered "parenting schedule" whereby the two children (Suraj and Sujay) would be together on weekends, alternating between each parent's home, but that Suraj would not be going to Mother's house until the therapist believed it was in the children's best interests. (Exh 1 at pp. 5-6.)

On May 15, 2008, a hearing was held on Mother's ex parte request (filed that day) to change the custody arrangement. The court ordered, *inter alia*, that Father was to have two hours per week of supervised visitation with Sujay, and that the children were to have no contact with each other until a therapist was assigned

to Sujay and pending further order of the court. (Exh 3 at p. 22.)

On May 29, 2008, Mother filed another petition to remove Suraj from Father's custody. The court denied this motion, stating that "the proper remedy for enforcement of the court's orders is an OSC re contempt; removal of Suraj from father's custody is within the jurisdiction of County Counsel's office by way of a Welfare & Institutions Code section 300 proceeding." (Exh 4 at p. 24.)

On February 10, 2009, Mother filed an order to show cause seeking to have Suraj removed from Father's custody. (Exh 5.) This petition was not served on Father until February 20, 2009. (Exh 7 at p. 74.)

On February 11, 2009, the court entered a Restraining Order After Hearing, based upon a February 10, 2009 hearing, at which Father was not present. (Exh

6.) This order named Mother, along with Suraj and Sujay as restrained persons and included a child custody and visitation order granting sole legal and physical custody to Mother, with no visitation Father. (Exh 6 at p. 54.)

On February 20, 2009, Father was served with this court order. (Exh 7 at p. 74.) While Father was in court receiving these papers, Suraj was physically removed from Father's home in handcuffs and taken to psychiatric facility, where he stayed until at least March 9, 2009. (Exh 9 at p. 238; Exh 13 at p. 475.)

On February 27, 2009, Father filed an Answer to the TRO. (Exh 7.) He later filed supplemental declarations and additional exhibits. (Exhs 8, 9.) The evidentiary hearing was held on March 10 and 13, 2009. (Exh 13.) Mother was represented by counsel; Father was in pro per.

On March 13, 2009, Father filed a declaration stating that he had subpoenaed Dr. Blanco, the psychiatrist Mother had testified was treating Suraj, and the doctor had refused to testify, stating that he had no records concerning Suraj. (Exh 10 at p. 256.) This was corroborated by Father during the hearing. (Exh 13 at pp. 486-487.) The court stated that, notwithstanding Dr. Blanco's failure to appear, trial would be concluded that day. (Exh 13 at pp. 489-490.) And yet, during the hearing, the reunification therapist testified that Dr. Blanco thought Suraj had parental alienation syndrome, that he no ego, and that he was emotionally damaged. (Exh 13 at pp. 387, 428-429.) She also presented a confidential report that contained numerous references to such hearsay. (Exh 14.)

Moreover, Father specifically requested that the court allow Suraj to testify, and raised a due process issue thereby. (Exh 13 at p. 395 ["Your honor, from a process standpoint . . . ¶ . . . I also want to know if Suraj Nair—I am requesting the Court, have him talk to you directly."]) The court refused, stating, "I have made a very strong policy not to talk to the children." (Ibid.)

Petitioner also raised the due process issue of having subpoenaed a witness, who refused to appear at trial, while a third party was allowed to testify as to what that witness had said. (Exh 13 at pp. 486-493 ["Dr. Blanco is not here. I followed the due process to get him to testify in terms of what the facts are."])

On March 13, 2009, the court ruled that Father was prohibited from contacting Suraj and that the restraining order would be in effect for one year. (Exh 13 at pp. 578-579.) Mother's attorney prepared a

formal order, to which Father objected, as it included items that were never ruled upon by the court and on which no evidence had been presented. (Exh 11.) This order was entered on March 25, 2009. (Exh 12.)

On May 4, 2009, Jayraj filed a petition for writ of mandate to the Third District Court of Appeal. On May 28, 2009, this writ petition was summarily denied. (App. 2a.) On June 5, 2009, Jayraj filed a petition for review to the California Supreme Court. On July 8, 2009, this petition was denied. (App A-1.)

V. LEGAL ARGUMENT

A. Jayraj Was Deprived of His Due Process Right to an Opportunity to Be Heard

The trial court prohibited Suraj—the 12 year-old who was listed as an additional restrained person—from testifying at trial. This was not only a violation of Jayraj's due process rights to be heard through

witnesses; it was a violation of Suraj's civil rights to have been forcibly removed from the home of the one parent he loved without even allowing him to testify.

During the hearing, Jayraj asked the court to permit Suraj to testify. (Exh 13 at p. 117:10-13.) The court refused, stating "I will not talk to the child. I have made a very strong policy not to talk to the children." (Exh 13 at p. 117:15-16.) This was not only error; it was a deprivation of Jayraj's due process rights.

Given the importance of the proceedings, and the hearsay allegations that were being made as to Suraj's mental state, it was a violation of due process for the court not to allow Suraj to testify. Essentially, Mother was allowed to sequester the boy in a mental institution, against his will, while lodging allegations against his father in an effort to obtain a restraining order *that Suraj had no opportunity to testify he*

wanted. Jayraj raised this constitutional issue in his response to the restraining order. (Exh 7 at p. 94 ["Handcuffing a forcibly removing a child without due process . . . was a severe form of emotional abuse . . ."])

Jayraj had subpoenaed Dr. Blanco, the person whom Bindu had identified as Suraj's psychiatrist, to appear and produce his records concerning Suraj. (Exh 10.) Dr. Blanco refused to appear; he called Jayraj he morning of the hearing and stated that he had no records and would not be appearing. (Exh 13 at p. 486:13-25.) The court stated that, notwithstanding Dr. Blanco's failure to appear, trial would be concluded that day. (Exh 13 at pp. 489-490.) Thus was Jayraj deprived of cross-examining the one person who had the most knowledge as to Suraj's mental and emotional state and as to whether Suraj needed

protection from his father. And yet, during the hearing, Janelle Burrill had testified that Dr. Blanco thought Suraj had parental alienation syndrome, that he no ego, and that he was emotionally damaged. (Exh 13 at pp. 387, 428-429.) She also presented a confidential report that contained numerous such references. (Exh 14.) This hearsay testimony was the basis for the trial court's decision to prohibit Jayraj from contacting Suraj for one year.

Due process, at a minimum, requires that before one can be deprived of property—including the custody of a child—one must be given notice and an opportunity to be heard. Armstrong v. Manzo, 380 U.S. 545, 550 (1964).

In California, due process allows a party to appear and produce evidence, including the testimony of witnesses. See Fewel v. Fewel (1943) 23 Cal.2d 431, 433.

In Fewel, the trial court in a custody-modification hearing refused to take any testimony or evidence, and made its ruling based solely upon the recommendation of the court investigator. The California Supreme Court found the error reversible per se:

> Such procedure cannot be sustained. By it the plaintiff was denied the fair trial in open court to which she was entitled; she was deprived of the right to produce and have consideration given to material evidence; she was precluded from cross-examination of adverse witnesses; and the order rests upon no evidentiary foundation whatsoever. Such errors require a reversal of the order.

(Fewel, supra at p. 433.)

By refusing to allow Suraj to testify on his own behalf, or at Jayraj's request, and by allowing the trial to proceed based upon hearsay testimony while refusing to allow Jayraj to compel the presence of the witness whose words were being used in the courtroom, the court denied Jayraj his due process rights to a fair hearing and an opportunity to be heard.

Petitioner raised this due process issue during the underlying trial, in which he represented himself in pro per. He raised the due process issue of having subpoenaed a witness, who refused to appear at trial, while a third party was allowed to testify as to what that witness had said. (Exh 13 at pp. 486-493 ["Dr. Blanco is not here. I followed the due process to get him to testify in terms of what the facts are."]) He also raised the due process issue of requesting that his son be permitted to testify at the hearing. (Exh 14 at p. 395

["Your honor, from a process standpoint . . . ¶ . . . I also want to know if Suraj Nair—I am requesting the Court, have him talk to you directly."])

The record, as a whole, shows that Petitioner intended to raise the federal due process issue at trial, even though he did not use those specific words. See New York ex. rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1929); Eddings v. Oklahoma, 455 U.S. 104, 113-114, n. 9 (1982).

Petitioner also raised this issue in his petition for writ of mandate to the California appellate court. He argued that his due process rights to present the testimony of witnesses had been violated. Although Petitioner cited only California cases therein, he raised federal issues, and the cases which he cited referred to federal cases. See, e.g., In re Henry V. 119 Cal.App.4th

522, 529-530 (2004), citing Santosky v. Kramer, 455 U.S. 745, 753 (1982).

B. The Order Violates Jayraj's Constitutional Rights to Raise His Children

In his response to the request for restraining order, Jayraj raised this constitutional issue, stating,

> "A parent's right to care, custody and management of a child is a fundamental liberty interest protected by the federal Constitution that will not be disturbed except in extreme cases where the parent acts in a manner incompatible with parenthood." (In re Marquis D. (1995) 38 Cal.App.4th 1813, 1828.)

(Exh 7 at p. 96.) Although he cited to a California case, the reference is to a federal constitutional right, and the Marquis case cites to federal law. See, Marquis, supra at p. 1828, citing Santosky v. Kramer 455

U.S. 745, 753 (1982) and Stanley v. Illinois, 405 U.S. 645, 651 (1972).

Parents have a constitutionally protected interest in the companionship, care, custody, and management of their children. Haag v. Cuyahoga County, 619 F.Supp 262, 276 (D.C. Ohio 1985), aff'd 798 F.2d 1414.

By the restraining order, Jayraj's parental rights to Suraj were effectively terminated: he is prohibited from seeing Suraj for one year—and from having *any contact* with Suraj during that time. This is a deprivation of Jayraj's constitutional right to raise his children. The order eviscerates Jayraj's right to raise his son without satisfying the constitutional requirements of such.

"A parent's right to care, custody and management of a child is a fundamental liberty interest protected by the federal Constitution that will not be

disturbed except in extreme cases where a parent acts in a manner incompatible with parenthood." In re Marquis D., supra 38 Cal.App.4th at p. 1828, citing Santosky v. Kramer, supra 455 U.S. at 753 and Stanley v. Illinois, supra 405 U.S. at 651.

C. CONCLUSION

By taking Suraj from his home, placing him in a psychiatric facility, and prohibiting him from having any contact with his father for one year—without allowing him to even testify at the hearing—the trial court disregarded both Jayraj's and Sujraj's constitutional due process rights.

Petitioner respectfully requests that this Court grant certiorari and order the respondent Superior Court of California in and for the County of Placer to set aside and vacate its order of March 25, 2009 and to enter a

new and different order denying the request for restraining order.

Dated: 11/30, 2009

Respectfully submitted,

STEPHANIE J. FINELLI,
Attorney for Petitioner,
Jayraj Nair

APPENDICES

A. California Supreme Court Denial of Petition for Review(July 8, 2009).....App A-1

B. Denial of Petition for Writ of Mandate, California Appellate Court, Third District Court of Appeal (May 28, 2009).....App A-2

C. Granting of Restraining Order, Placer County Superior Court (March 13, 2009) .....App A-3

Court of Appeal, Third Appellate District – No. C061761

S173589

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JAYRAJ NAIR, Petitioner,

v.

THE SUPERIOR COURT OF PLACER COUNTY, Respondent;

BINDU NAIR, Real Party in Interest.

The petition for review is denied.

Supreme Court
FILED
Jul – 8 2009
Frederick K. Ohlrich Clerk
Deputy

GEORGE /s/
Chief Justice

IN THE
Court of Appeal of the State of California
IN AND FOR THE
THIRD APPELLATE DISTRICT

FILED
MAY 28 2009
COURT OF APPEAL–THIRD DISTRICT
BY DEENA C. FAWCETT Deputy

JAYRAJ NAIR,

Petitioner,

v.

THE SUPERIOR COURT OF PLACER COUNTY,

Respondent;

BINDU NAIR,

Real Party in Interest.

C061761
Placer County
No. SDR26925

BY THE COURT:

The petition for writ of mandate or prohibition is denied.

Dated: May 28, 2009 BLEASE, Acting P.J.

DV-130 Restraining Order After Hearing
(Order of Protection)

Placer County Superior Court of California

Filed March 25 2009
Don Schell—Interim Executive Officer & Clerk
/s/ Deputy

Case Number: **SDR-26925**

(1) Protected person's name:

BINDU NAIR

Lawyer:

Karen L. Mathes, Esq. SBN 126340

P.O. Box 366

Wallace, CA 95254

(209) 763-5648

(2) List the full names of all family or household members protected by this order:

BINDU NAIR (EX-WIFE)

SURAJ NAIR (CHILD)

SUJAY NAIR (CHILD)

(3) Restrained person's name:

JAYRAJ NAIR

Description of that person: Sex: M Height: 5'7" Weight: 175 Race: East Indian

Hair Color: BLACK Eye Color: BLACK Age: 41 Date of Birth: 7/15/67

Relationship to protected person: EX-HUSBAND AND FATHER OF TWO CHILDREN

(4) The Court orders are on pages 2 and 3 and attachment pages (if any).

The hearing was on: 3/10/09 & 3/13/09 with Hon. J. Richard Couzens

The orders end on: March 13, 2010

(5) The people in (1) and (3) must return to court on _____ to review _____[blank]

Certificate of Compliance With VAWA

This protective order meets all Full Faith and Credit requirements of the Violence Against Women Act, 18U.S.C. §2265 (1994) (VAWA). This court has jurisdiction over the parties and the subject matter; the restrained

person has been afforded reasonable notice and an opportunity to be heard as provided by the laws of this jurisdiction. This order is valid and entitled to enforcement in each jurisdiction throughout the 50 United States, the District of Columbia, all tribal lands, and all U.S. territories, commonwealths, and possessions and shall be enforced as it were an order of that jurisdiction.

(6) Personal Conduct Orders

The person in (3) must not do the following things to the protected people listed in (1) and (2):

a. Harass, attack, strike, assault (sexually or otherwise), hit, follow, stalk, destroy personal property, disturb the peace, keep under surveillance, or block movements

b. Contact (either directly or indirectly), telephone, or send message or email

c. Take any action, directly or through others, to get the addresses or locations of any protected persons or their family members, caretakers or guardians.

Peaceful written contact through a lawyer or process server or another person in order to serve legal papers is allowed and does not violate this order.

(7) Stay-Away Order

The person in (3) must stay at least 100 yards away from

a. The person listed in (1)

b. The people listed in (2)

c. Home, job, vehicle of person in (1)

d. The children's school or child care

e. Offices of court-appointed therapists for children

(8) Move Out Order [blank]

(9) Child Custody and Visitation

Child custody and visitation are ordered on the attached Form DV-140 or DV-145

(10) Child Support [blank]

(11) Spousal Support [blank]

(12) No Guns or Other Firearms or Ammunition

The person in (3) cannot own, possess, have, buy or try to buy, receive or try to receive, or in any other way get guns, firearms, or ammunition.

(13) Turn in or Sell Guns and Firearms

The person in (3):

Must sell to a licensed gun dealer or turn into police any guns or firearms that he or she has or controls. This must be done within 24 hours of being served with this order.

Must bring a receipt to the court within 48 hours of being served with this order, to prove that guns and firearms have been turned in or sold.

(14) Record Unlawful Communications

The person in (1) has the right to record communications made by the person in (3) that violates the judge's orders.

(15) Batterer Intervention Program

The person in (3) must go to and pay for a 52-week batterer intervention program and show written proof of completion to the court. This program must be approved by the probation department.

(16) No Fee to Notify (Serve) the Restrained Person

If the sheriff or marshal serves this order, he or she will do it for free.

(17) Other Orders [blank]

(18) Service

The people in (1) and (3) were at the hearing or agreed in writing to this order. No other proof of service is needed.

(19) Attached pages are orders

Number of pages attached to this 5-page form: 14

All of the attached pages are part of this order.

Attachments include DV-140, DV-145, DV-170

Other: court orders OSC/temp. orders signed by court 2/10/09 w/attached recommendations of Dr. Burrill.

Date: 3/24/09 **Honorable J. Richard Couzens**

/s/

Instructions for Law Enforcement

(20) Start Date and End Date of Orders

The orders start on the earlier of the following dates:

The hearing date on page 1 or

The date next to the judge's signature on page 3

The orders end on the end date in item 4 on page 1. If no end date is listed, they end 3 years from the hearing date.

(21) Arrest Required If Order Is Violated

If an officer has probable cause to believe that the restrained person had notice of the order and has disobeyed the order, the officer must arrest the restrained person. (Penal Code §§836(c)(1), 13701(b).) A violation of the order may be a violation of Penal Code section 166 or 273.6.

(22) Notice/Proof of Service

Law enforcement must first determine if the restrained person had notice of the orders. If notice cannot be verified the restrained person must be advised of the terms of the orders. If the restrained

person then fails to obey the orders, the officer must enforce them. (Family Code §6383.)

Consider the restrained person "served" (noticed) if:

The officer sees a copy of the Proof of Service or confirms that the Proof of Service is on file, or

The restrained person was at the restraining order hearing or was informed of the order by an officer. (Fam.Code §6383; Pen. Code §836(c)(2).) An officer can obtain information about the contents of the order in the Domestic Violence Restraining Orders System (DVROS). (Fam.Code §6381(b), (c).)

(23) If the Protected Person Contacts the Restrained Person

Even if the protected person invites or consents to contact from the restrained person, the orders remain in effect and must be enforced. The protected person cannot be arrested for inviting or consenting to contact with the restrained person. The orders can be changed only by another court order. (Pen.Code § 13710(b).)

(24) Child Custody and Visitation

The custody and visitation orders are on Form CV-140, items (3) and (4). They are sometimes also written on additional pages or referenced in DV-140 or other orders that are not part of the restraining order.

Forms DV-100 and DV-105 are not orders. Do not enforce them.

(25) Enforcing the Restraining Order in California

Any law enforcement officer in California who receives, sees, or verifies the orders on a paper copy, the California Law Enforcement Telecommunications System (CLETS), or in an NCIC Protection Order File must enforce the orders.

(26) Conflicting Orders

A protective order issued in a criminal case on From CR-160 takes precedence in enforcement over any conflicting civil court order. (Pen.Code §136.2(e)(2).) Any nonconflicting terms of the civil restraining order remain in full force. An emergency protective order (Form EPO-001) that is in effect between the same parties and is more restrictive than

other restraining orders takes precedence over all other restraining orders. (Pen.Code § 136.2.)

Warnings and Notices to the Restrained Person in (3)

(27) If you do not obey this order, you can be arrested and charged with a crime.

It is a felony to take or hide a child against this order. You can go to prison and/or pay a fine.

If you travel to another state of to tribal lands or make the protected person do so, with the intention of disobeying this order, you can be charged with a federal crime.

If you do not obey this order, you can go to prison and/or pay a fine.

(28) You cannot have guns, firearms, and/or ammunition

You cannot own, have, possess, buy or try to buy, receive or try to receive, or otherwise get guns, firearms, or ammunition while the order is in effect. If you do so, you can go to jail and pay a $1,000 fine. You must sell to a licensed gun dealer or turn into police any guns or firearms that you have or control.

The judge will ask you for proof that you did so. If you do not obey this order, you can be charged with a crime. Federal law says you cannot have guns or ammunition while the order is in effect.

Clerk's Certificate

I certify that this Restraining Order After Hearing (Order of Protection) is a true and correct copy of the original on file in the court.

[COURT SEAL]

Date: 3/25/09 Clerk, by /s/, Deputy

DV-140 Child Custody and Visitation Order

This form is attached to DV-130

Protected person's name: BINDU NAIR, Mom

Other parent's name: JAYRAJ NAIR, Dad

The Court Orders:

Child Custody is ordered as follows:

Suraj Nair (DOB 7/31/96) Legal Custody to MOM; Physical Custody to Mom

Sujay Nair (DOB 12/29/03) Legal Custody to MOM; Physical Custody to Mom

Child Visitation is ordered as follows:

No visitation to Dad. No visit-Suraj; supervised visit order in place for Sujay.

Travel With Children

Dad must have written permission from the other parent, or a court order, to take the children outside of: NO TRAVEL AT ALL WITH SURAJ OR SUJAY.

Child Abduction

There is a risk that one of the parents will take the children out of California without the other parent's permission. The orders in Form DV-145 are attached and must be obeyed.

Jurisdiction

This court has jurisdiction to make child custody orders in this case under the Uniform Child Custody Jurisdiction and Enforcement Act (part 3 of the California Family Code starting with section 3400).

Notice and Opportunity to Be Heard

The responding party was given notice and an opportunity to be heard as provided by the laws of the State of California.

County of Habitual Residence

The country of habitual residence of the child or children in this case is the United States of America.

Penalties for Violating This Order

If you violate this order, you maybe subject to civil or criminal penalties or both.

DV-145 Order: No Travel With Children

This form is attached to DV-140 Child Custody and Visitation Order

(1) Protected Person's name: BINDU NAIR, Mom

(2) Other Parent's name: JAYRJA NAIR, Dad

(3) The Court finds there is a risk that JAYRAJ NAIR might take the child without permission because that parent:

a. Has violated—or threatened to violate—a custody or visitation order in the past;

c. Has done things that make it easy for him or her to take the children without permission. He or she has applied for a passport, birth certificate, or school or medical records;

d. Has a history of domestic violence, child abuse, not cooperating with the other parent in parenting;

f. Has family or emotional ties to another county, state, or foreign country.

The Court makes the following orders to prevent the parent in (3) from taking the children without permission. These orders are valid in other states and

any country that has signed the Hague Convention on The Civil Aspects of International Child Abduction.

(4) Post a Bond [blank]

(5) Do Not Move Without Permission of the Other Parent or Court Order

The parent in (3) must not move with the children without permission in writing from the other parent or a court order.

(6) Do Not Travel Without Permission of the Other Parent or Court Order

The parent in (3) must NOT travel with the children outside this county, California, the United States, no travel with children.

(7) Notify other State of Travel Restrictions [blank]

(8) Turn in and Do Not Apply for Passports or Other Vital Documents

The parent in (3) must not apply for passports or other documents (such as visas or birth certificates) that can be used for travel, and must turn in the following documents: any current passport/applications for passports for Jayraj or children.

(9) Provide Itinerary and other Travel Documents [blank]

(10) Notify Foreign Embassy or Consulate of Passport Restrictions

The parent in (3) must notify the embassy or consulate of India of this order and provide the court with proof of that notification within 10 days.

(11) Foreign Custody and Visitation Order [blank]

(12) Enforcing the Order

The court authorizes any law enforcement officer to enforce this order. In this county, contact the Child Abduction Unit of the Office of the District Attorney at 10810 Justice Center Drive, Ste. 240, Roseville, CA 95678

(13) Other [blank]

Notice to Authorities in Other States and Countries

This court has jurisdiction to make child custody orders under California's Uniform Child Custody Jurisdiction and Enforcement Act (California Family Code, part 3 §3400 et. seq.) and the Hague Convention on The Civil Aspects of International Child Abduction (42 U.S.C. §11601 et. seq.). If jurisdiction is based on other factors, they will be listed in paragraph 13 above.

Date: 3/24/09 Honorable J. Richard Couzens /s/

DV-170 Other Orders

This form is attached to DV-140 Child Custody and Visitation Order (Order of Protection).

(1) Protected Person's name: BINDU NAIR, Mom

(2) Other Parent's name: JAYRJA NAIR, Dad

(3) Property Control [blank]

(4) Debt Payment [blank]

(5) Property Restraint [blank]

(6) Attorney Fees and Costs [blank]

(7) Payments for Costs and Services [blank]

(8) Other Orders

See Attachment #1 to DV-170 #8 Other Orders Attached Hereto.

ATTACHMENT (Number): 1

DV-170—other orders--¶8 (other orders)

1. Mother shall have sole legal and sole physical custody of both children—Suraj and Sujay Nair.

2. The court finds that alienation of Suraj Nair from his mother by his father has been established by the evidence in this case. The evidence on which the court relies is contained in the reports of Dr. Burrill and the comments of other court-appointed therapists in this case, as well as the following evidence: testimony of Kelly Graham regarding the child's extreme reaction to mother's presence on the child's school campus; evidence of father not fully complying with court orders reflecting a lack of commitment to engage in the counseling and reunification program laid out by the court; evidence of father's desire to control things by taking Suraj to an unauthorized therapist, by using father's own doctor for a psychiatric evaluation instead or relying on neutral court evaluators, by extremely inappropriate conduct in having Suraj pay for his own counseling sessions, and by evidence that father has not undertaken any supervised visitation with Sujay Nair.

3. The court reaffirms that it is not in the best interests of Suraj Nair for father to have any contact at this time. The court finds that contact between father and Suraj will substantially undermine the therapeutic efforts that are being undertaken. The court clearly finds that contact by father with Suraj is not in the child's best interests. The court further finds that it would be detrimental to Suraj's interests if contact by father with Suraj was allowed. This order for "no contact" means direct or indirect contact—either directly by father or indirectly with the child through another person or means, without court approval.

4. With respect to Suraj Nair, supervised visitation orders remain in effect as previously ordered.

5. The court has continuing jurisdiction to renew these orders until the child(ren) are 18 years old.

6. The court has continuing jurisdiction to modify these orders based on change of circumstances.

7. The court reaffirms all prior orders not modified by this order.

No. 09-660

SUPREME COURT, U.S.
JAN 6 - 2010

In The
Supreme Court of the United States

JAYRAJ NAIR,

Petitioner,

vs.

THE SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF PLACER,

Respondent.

and

BINDU NAIR,

Real Party In Interest.

On Petition For A Writ Of Certiorari To The Court Of Appeal of California, Third Appellate District

BRIEF IN OPPOSITION OF BINDU NAIR

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OPINIONS BELOW

The Placer County trial court entered the domestic violence restraining order on March 25, 2009. The California Court of Appeal entered the order denying the writ petition for extraordinary relief on May 28, 2009. The California Supreme Court entered the order denying the petition for review on July 8, 2009. None of the decisions was published.

JURISDICTION

The writ petition for extraordinary relief was decided by the California Court of Appeal on discretionary grounds not invoking any of the bases for jurisdiction of this Court as set forth in 28 U.S.C. section 1257 (a) or as referenced in this Court's Rule 10. The order of the California Supreme Court denying review was entered on July 8, 2009. The petition for a writ of certiorari was filed in this Court on September 9, 2009.

INTRODUCTION

This petition – labeled a request to review "a federal constitutional issue regarding due process rights" – arises out of a domestic violence restraining order in an ongoing family law matter in Placer County, California. The California Supreme Court denied review of the California Court of Appeal's

discretionary denial of a writ petition for extraordinary relief. Subsequent to filing the writ petition for extraordinary relief in the California Court of Appeal, petitioner filed an appeal of the same restraining order in the same appellate court [The pending appeal is case number C062004 in the Third District Court of Appeal]. Petitioner omits mention altogether of his pending appeal. The appeal raises the same due process arguments raised in the petition for a writ of certiorari. The state appellate court has not yet had an opportunity to decide the appeal. Briefing was complete as of November 16, 2009, and the parties await notice of oral argument and a decision on the merits. The pending appeal renders this petition for a writ of certiorari moot.

The petition to this Court fails to address the only issue, *i.e.*, whether the California appellate court improperly denied the writ petition for extraordinary relief, and why this Court should grant review of *that* issue. Instead, the petition attempts an end-run around normal appellate procedures and requests review of the case on the merits – merits which are now being reviewed by the California Court of Appeal but have not yet been decided and, therefore, are not properly before this Court. Because there are material misstatements in the petition, and out of an abundance of caution, real party in interest will briefly address the due process arguments raised in the petition. (Rules of the United States Supreme Court, Rule 15.) The state appellate courts, however,

exercised their discretion to deny petitioner extraordinary relief; they did not review or decide any federal questions in doing so. The petition for a writ of certiorari should, therefore, be denied.

STATEMENT OF THE CASE

The petition for a writ of certiorari arises out of an ongoing family law matter pending in California in the Placer County Superior Court. The petitioner, Jayraj Nair, and real party in interest, Bindu Nair, are the parents of two minor children, Suraj (born in July 1996) and Sujay (born in December 2003). In 2006, real party in interest filed a petition under California's Domestic Violence Prevention Act alleging emotional abuse of the children by petitioner. (Cal. Fam. Code §6200, et seq.) Petitioner subsequently filed a petition for dissolution, and the matters were consolidated in the trial court.

Following a bifurcated custody trial, the trial court found that petitioner had alienated the older child, Suraj, from real party in interest. On March 27, 2008, the trial court ordered, among other things, ongoing reunification therapy for Suraj and real party in interest. The order also provided for specific parenting time and holidays [The reports were submitted by petitioner as confidential Exhibit 14 to the appendix of exhibits filed in support of the writ petition for extraordinary relief and are numbered consecutively in that appendix using the designation

"AWrA."]. (AWrA 1-18.) Petitioner failed to heed the trial court's orders and, on May 15, 2008, after a hearing where both parties were present and gave testimony, the March 27, 2008 order was modified to provide for supervised-only visitation between petitioner and the younger child, Sujay. (AWrA 21-22.)

On October 1, 2008, Dr. Janelle Burrill was appointed by the court as a reunification counselor for the older child, Suraj. On February 10, 2009, the trial court issued an order to show cause and, on February 11, 2009, the trial court *sua sponte* issued a temporary restraining order ("TRO") against petitioner. (AWrA 25-71.) Petitioner incorrectly states in the petition to this Court that the February 11, 2009 TRO was an order entered after an evidentiary hearing. (Pet. 5.) The trial court actually issued the TRO *sua sponte,* based on information contained in a confidential report made to the trial court by Dr. Burrill on February 6, 2009. (AWrA 584-630.) Dr. Burrill's report contained information that petitioner had threatened to kill real party in interest and had emotionally abused and severely alienated the older child, Suraj, from real party in interest. (*Id.*)

The February 11, 2009 TRO did not cut off petitioner's visitation rights as petitioner asserts (Pet. 6); it gave real party in interest sole legal and physical custody of both children and ordered petitioner to have no contact with the older child until further order of the court and to undergo a psychiatric assessment and treatment. (AWrA 54-71.) Petitioner also misstates the basis for issuance of the

TRO as a hearing "at which [he] was not present." (Pet. 5.) The trial court issued the TRO *sua sponte,* based on information reported to the court by Dr. Burrill in a written report – not based on other pleadings or proceedings in the case as petitioner suggests. (AWrA 54-71.) Petitioner also incorrectly identifies real party in interest and the children as "restrained parties." (Pet. 5-6.) In fact, real party in interest is a *protected* person under the restraining orders, as are the children; the only restrained party is petitioner.

Petitioner was served with the order to show cause and TRO on February 20, 2009, and law enforcement personnel returned Suraj to real party in interest's custody that same day. (AWrA 54-71.) The evidentiary hearing on the domestic violence restraining order was held on March 10, 2009 and March 13, 2009. (AWrA 273-583.) Both parties testified, called and cross-examined witnesses, introduced documents, and gave closing arguments.

Petitioner misstates the substance of Dr. Burrill's reports and her trial testimony. (Pet. 7.) These misstatements materially undermine petitioner's arguments. Contrary to petitioner's assertion, Dr. Burrill gave trial testimony about *two* reports – one which *predated* any involvement by the psychiatrist, Dr. Robert Blanco, about whose failure to testify petitioner complains. (AWrA 371-372; 376-377.) Dr. Burrill's reports were admitted into evidence. (AWrA 376-377.) Dr. Burrill's February 6, 2009 report stated, "*Father presents a serious risk of physical harm to*

Mother and to minor Suraj . . . if he has contact." (AWrA 596, emphasis in original.) She also reported that "based on the behaviors displayed by Father at my office, on the telephone, and in his e-mails, he is seriously mentally disturbed . . . " (*Id.*) Dr. Burrill concluded that petitioner needed a psychiatric assessment and related treatment. (*Id.*) Dr. Burrill's confidential supplemental reunification report of February 25, 2009 noted that Suraj had been removed from "a very dangerous parent whose hatred for Mother was imparted daily to the point where killing Mother was discussed with Suraj." (AWrA 628.) The report concluded, as follows:

> Sujay reported to his therapist on December 31, 2008 that Father and Suraj had discussed killing Mother. This is violent and beyond belief until you interview the Father, and Suraj. Father is very capable of doing anything to achieve his goals; including harming anyone who gets in his way. (*Id.*)

Both of Dr. Burrill's February 2009 reports were admitted into evidence at the hearing without objection by petitioner. (AWrA 376-377.) Dr. Burrill also testified, without objection, to her expert opinion of the mental state of the child, as well as to the emotional abuse perpetrated on the child by petitioner, *prior to and separate from any involvement by Dr. Blanco* – who did not see Suraj prior to February 20, 2009. (AWrA 378-380; 386:12-389:6; 400-402.)

Petitioner subpoenaed three witnesses, including Dr. Robert Blanco. However, on March 13, 2009, prior

to the beginning of proceedings that day, petitioner reported to the court that Dr. Blanco had advised him that he did not intend to appear at the hearing because he did not have any of the documents petitioner had subpoenaed. (AWrA 486:12-23.) Petitioner complained, "I would like to get medical information from this physician," and asked "How would you (the trial court) recommend I get Dr. Robert L. Blanco's testimony this morning or this afternoon?" But petitioner never took the necessary steps to obtain Dr. Blanco's testimony – despite the court's comments that petitioner had remedies available to him and the court's admonition that it could not advise him how to proceed. (AWrA 489:25-490:12.) Instead, petitioner rested his case without the testimony of Dr. Blanco.

Petitioner also never subpoenaed then 12-year-old Suraj to testify or appear at trial. Suraj was not one of the three witnesses whom petitioner chose to subpoena to testify and Suraj was not present at the trial. Instead, petitioner requested only that the court "have him (Suraj) talk to you directly so you can hear it directly from Suraj if there is any emotional abuse . . . " There was no offer of proof. The court responded:

> I will not talk to the child. I have made a very strong policy not to talk to the children. This is not their fight. It's between the parents and regrettably it's a very bitter, acrimonious one. If I made a decision, regardless of what I rule, the child will blame himself whether it's a good decision or bad decision. I feel that's a terrible burden to

> place upon the child. Particularly one as apparent (sic) as the child is very fragile for whatever reason. (AWrA 395:10-23.)

Petitioner rested his case without the testimony of Suraj.

The trial court issued its ruling on March 13, 2009. (AWrA 572-583.) The order after hearing was filed on March 25, 2009. (AWrA 262-272; Writ Opp. 1-19.) The restraining orders are in effect until March 13, 2010; by their terms they are renewable until the children reach 18 years of age. (*Id.*) Petitioner's exhibits do not contain a complete copy of the March 25, 2009 order. Petitioner's copy omits six pages of Dr. Burrill's report that are included in the order and that recommend, among other things, psychiatric assessment and counseling for petitioner prior to any further contact with Suraj [A complete copy of the order after hearing is contained in real party in interest's Appendix filed in opposition to the writ petition in the California Court of Appeal on May 13, 2009. (Writ Opp. App. 1-19, case no. C061761.)]. The complete order is contained in the appendix submitted with real party in interest's opposition to petitioner's writ in the California Court of Appeal.

On May 4, 2009, petitioner filed a petition for extraordinary relief for a writ of mandate, in the California Court of Appeal, Third Appellate District, case no. C061761. Real party in interest filed an opposition on May 13, 2009. The California Court of Appeal denied the writ petition on May 28, 2009.

While the writ petition was pending in the California Court of Appeal, petitioner also filed a notice of appeal of the same restraining orders upon which he had sought the writ. The notice of appeal was filed on May 22, 2009. (California Court of Appeal, Third District, case no. C062004.) Briefing was complete as of November 16, 2009 in the appeal; oral argument and a decision on the merits are pending.

On June 5, 2009 – after filing the notice of appeal – petitioner filed a petition for review of the denial of the writ petition in the California Supreme Court. Real party in interest answered that petition for review on June 17, 2009; the petition for review was denied by the California Supreme Court on July 8, 2009. The petition for a writ of certiorari in this Court was filed on September 9, 2009.

ARGUMENT

A. This Court Lacks Jurisdiction Pursuant To 28 U.S.C. §1257.

Petitioner's statement of jurisdiction is incorrect. Petitioner asserts that this Court "has jurisdiction to review the California Supreme Court decision denying petitioner's petition for review because the issue on review was a federal constitutional issue regarding due process rights." He supports this jurisdictional statement by citation to 28 U.S.C. §1257. (Pet. 2.)

28 U.S.C. §1257 provides that:

> final judgments . . . rendered by the highest court of a State . . . may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed . . .

Nothing in Section 1257 provides a basis for petitioner to raise a federal constitutional due process argument from the discretionary denial of extraordinary relief by the California appellate courts, and no grounds specified in the petition satisfy the criteria for review set forth in Section 1257.

1. The Petition Does Not Raise Any Of The Grounds Set Forth In Supreme Court Rule 10.

Concepts of federalism, the necessity to avoid advisory opinions, as well as judicial economy, favor restraint when considering whether Supreme Court jurisdiction may properly be exercised. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons . . . A petition for a writ of certiorari is rarely granted when the

asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." (Rules of the United States Supreme Court, Rule 10.)

Petitioner asks this Court to review orders of the California appellate courts that deny discretionary extraordinary writ relief where an appeal is now pending on the merits but has not yet been decided. Such a request does not invoke the considerations set forth in Supreme Court Rule 10. Petitioner does not present "compelling reasons" for this Court to grant review; there are no unsettled questions of federal law and there is no conflict between courts of different states or between state courts and a United States court of appeals.

B. Extraordinary Relief Was Properly Denied By The California Appellate Courts.

California Code of Civil Procedure Section 904.1(a)(6) provides that an appeal may be taken from an order granting or dissolving an injunction. *Alliant Ins. Services, Inc. v. Gaddy*, 159 Cal.App.4th 1292, 1299, fn. 7 (2008). A domestic violence restraining order thus is appealable. Unlike appeals which are heard in California as a matter of statutory right, however, relief through writ review is deemed extraordinary, equitable and completely discretionary. *Omaha Indemnification Co. v. Superior Court*, 209 Cal.App.3d 1266, 1272-1273 (1989). "Extraordinary relief is supposed to be extraordinary" and is "not

available as a matter of course." *Roden v. AmerisourceBergen Corp.*, 130 Cal.App.4th 211, 213 (2005).

In *Science Applications Int'l Corp. v. Superior Court*, 39 Cal.App.4th 1095 (1995), the California Court of Appeal explained:

> [W]e address the propriety of writ review notwithstanding the existence of a clear remedy by appeal. It is well known that writ relief is deemed "extraordinary." We deny the vast majority of petitions we see and we rarely explain why. In reality, ***perhaps the most fundamental reason for denying writ relief is the case is still with the trial court and there is a good likelihood purported error will be either mooted or cured by the time of judgment***. As one court has summarized it: "[I]f it were granted at the drop of a hat, [writ review] would interfere with an orderly administration of justice at the trial and appellate levels. . . ."

(*Id.* at 1100, emphasis added.)

This case is still with the Placer County trial court and the California appellate courts had the discretion, and appropriately exercised that discretion, to deny extraordinary relief.

C. The Petition Should Be Denied As Moot; An Appeal Is Pending On The Same Issues.

The petition for a writ of certiorari should be denied as moot. This Court has held that "a case is

moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack,* 395 U.S. 486, 496 (1969). The only issue presented by the petition here – whether the California appellate courts properly denied a petition for extraordinary relief by writ of mandate – has no currency. Petitioner has filed an appeal on the merits which is pending in the California Court of Appeal. The case has been fully briefed and is awaiting oral argument and decision. Accordingly, the issue of whether the lower courts should have granted petitioner extraordinary relief by way of a writ of mandate is no longer alive and the petition to this Court is moot.

D. Petitioner Was Not Denied Due Process.

Petitioner contends that the trial court violated his "due process rights to be heard through witnesses" when it failed to "talk to" Suraj, and by not taking action to ensure that Dr. Blanco complied with the subpoena issued for his testimony. (Pet. 9-11.)

1. The Trial Court Properly Exercised Its Discretion To Not Talk To Suraj.

The trial court considered – and rejected – petitioner's request that the court "talk to" Suraj. This was a proper exercise of the court's discretion under state law. (AWrA 395:10-23.) California Family Code Section 3042(b) provides that a "court may preclude the calling of the child as a witness where the best

interests of the child so dictate and may provide alternative means of obtaining information regarding the child's preferences."

The trial court was presented with expert witness testimony that then 12-year-old Suraj had been alienated from his mother by his father at least since August 2006 and was emotionally disturbed. (AWrA 593-596.) At least three expert evaluators interviewed Suraj; their reports reflected Suraj's feelings as well as the evaluators' professional assessments of his emotional state (including that he was emotionally disturbed, enmeshed with his father, and alienated from his mother). (AA 199-221, 251-267, 303-308; AWrA 584-630.) Thus, the record plainly establishes that Suraj's preferences were otherwise in evidence before the trial court. In light of such evidence, the court properly exercised its discretion under Family Code Section 3042 and denied petitioner's request that emotionally-fragile Suraj talk to the court.

2. Petitioner Was Not Denied Due Process Based On Dr. Blanco's Failure To Testify.

Petitioner did not make, and thus has forfeited, the argument to the trial court that he makes now that he was denied due process because Dr. Blanco failed to appear at trial in response to a subpoena. Petitioner asserts that he raised the issue by the following: "Dr. Blanco is not here. I followed the due

process to get him to testify in terms of what the facts are." (Pet. 14.) It is beyond a stretch to construe this as sufficient to have raised a request to the trial court for any relief, much less to have raised a federal constitutional due process issue. This Court has stated that no jurisdiction for certiorari exists with respect to federal question issues not properly raised, considered, and decided in the state court. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); United States Supreme Court Rules, Rule 14.1(g)(i).

Petitioner had ample notice and a "full and fair opportunity to present all competent and material evidence relevant to the matter to be adjudicated." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ["The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'"]. The proper remedy for the failure of a witness to appear at trial is a motion to continue the trial. (*Jensen v. Superior Court*, 160 Cal.App.4th 266, 270-271 (2008) [subpoenaed witness's failure to appear at trial constitutes good cause for continuance]; California Rules of Court, Rule 3.1332.) Although petitioner advised the trial court that his subpoenaed witness was not going to appear, he did not file a motion to continue the trial based on Dr. Blanco's failure to appear; he merely complained about Dr. Blanco's lack of appearance and then proceeded to finish his case. Accordingly, petitioner forfeited the argument and failed to properly raise any federal constitutional due process issue in the

trial court sufficient to invoke the jurisdiction of this Court.

Petitioner also asserts that the trial court improperly permitted Dr. Burrill to present "hearsay" testimony concerning conversations with Dr. Blanco, and that the trial court improperly based its ruling on the alleged hearsay. He asserts that this constituted a denial of due process. (Pet. 12.) Petitioner waived any hearsay objection because he never raised it at trial. *People v. Cadogan*, 173 Cal.App.4th 1502, 1507 (2009); California Evidence Code §353(a) [timely, proper objection necessary to challenge admission of evidence on appeal]. Furthermore, the trial court did not base its ruling solely on Dr. Burrill's testimony regarding Dr. Blanco. To the contrary, the trial court relied on all of Dr. Burrill's testimony, her reports, the reports of other experts, other evidence and testimony of independent witnesses presented at trial, and the judicially-noticed record of previous proceedings. (AWrA 573-582.)

3. Petitioner Was Not Denied The Constitutional Right To Raise His Children.

Petitioner argues that the restraining order "eviscerates [his] right to raise his son without satisfying the constitutional requirements of such." (Pet. 17.) He concedes that the domestic violence restraining order is a temporary one-year order. His parental rights were not terminated by the State. He did not, and does not here, challenge the constitutionality of

California's Domestic Violence Protection Act in any particular respect and no federal constitutional issue was decided by the California Supreme Court when it denied discretionary review of the California Court of Appeal's denial of the writ petition for extraordinary relief.

CONCLUSION

The California appellate courts properly exercised their discretion to deny petitioner extraordinary relief. An appeal on the merits of the same issues raised in the petition to this Court is pending oral argument and decision in the California Court of Appeal. The petition for a writ of certiorari should be denied.

Dated: January 6, 2010

Respectfully submitted,

ALLMAN & NIELSEN, P.C.

SARA B. ALLMAN
Attorney for Real Party
In Interest, Bindu Nair